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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 539

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON, AND WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of Allied Owners Corporation, Petitioners

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 377–385) is not reported. The opinion of the Circuit Court of Appeals (R. 416–423) is reported in 79 F. (2d) 187.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 1, 1935 (R. 423). The petition

for a writ of certiorari was filed October 24, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of Congress of February 13, 1925.

QUESTION PRESENTED

Whether Section 48 of the National Bankruptcy Act fixes the maximum measure of compensation to trustees for their services in a bankruptcy proceeding when that proceeding has been superseded by a Section 77B reorganization proceeding.

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra*, pp. 9–13.

STATEMENT

On August 8, 1933, Allied Owners Corporation was adjudicated a bankrupt on its voluntary petition (R. 141). Respondent is pledgee of all the stock of the corporation, and is the principal unsecured creditor. On August 25, 1933, petitioners Callaghan and Jackson became trustees in bankruptcy, and, on September 14, 1933, petitioner Greve became the third trustee in bankruptcy (R. 2). On June 22, 1934, the bankruptcy proceeding was superseded by a Section 77B proceeding, at which time petitioners became trustees in reorganization (R. 3).

On or about January 28, 1935, applications for allowances for services performed in the bank-

ruptcy proceedings were filed with the referee in bankruptcy by petitioners, as trustees in bankruptcy (R. 6–136), and by others. After due notice and hearing, at which respondent and other creditors appeared in opposition, the referee, on March 2, 1935, filed his report, recommending allowances that included an allowance of $60,000 to petitioners for services performed as trustees in bankruptcy. (R. 287, 300.)

On March 8, 1935, the District Judge filed his memorandum increasing, without further hearing, the allowances to petitioners to $90,000 and approving the other allowances (R. 305–306). On March 11, 1935, orders were entered by the District Judge, in accordance with his memorandum opinion, and a further order was entered at the same time in the reorganization proceeding directing the trustees in reorganization to make the payments (R. 307–313).

Respondent moved to have the allowances reduced. The District Court filed its opinion overruling the motions (R. 377), and, on May 13, 1935, entered an order accordingly (R. 386).

On appeal by respondent from the orders of March 11, 1935, and May 13, 1935, the Circuit Court of Appeals ruled that Section 48 of the Bankruptcy Act fixed the maximum compensation for trustees in bankruptcy proceedings and accordingly reduced the allowances to petitioners from $90,000 to $14,628.50 (R. 420–423).

ARGUMENT

1. The court below held that Section 48 of the Bankruptcy Act fixes the maximum measure of compensation to trustees for their services in the bankruptcy proceeding, when that proceeding has been superseded by a reorganization proceeding under Section 77B. Petitioners here contend that Section 48 is inapplicable, and rely on subdivisions (i) and (k) of Section 77B.

There is no reason to deny to Section 48 its plain meaning. That section provides in part:

> Trustees shall receive for their services, payable after they are rendered, * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed [certain percentages] * * *.

Subdivision (i) of Section 77B provides in part:

> If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, * * * a petition or answer may be filed under this section * * * and the judge shall make such orders as he may deem equitable * * * for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said * * * prior trustee.

This subdivision expressly requires the prior court to fix the allowances. The prior bankruptcy

court was bound by the provisions of Section 48. Section 77B (i) does not remove this restriction on the prior court. The word "reasonable" gives the reorganization court the power to revise prior allowances, whether made in an equity receivership or in bankruptcy. Subdivision (i), therefore, authorizes the reorganization court merely to make "equitable orders" for the payment of prior allowances, in the words of the court below, "to the extent that they are found reasonable."

There is nothing in subdivision (k) of Section 77B which offers support to petitioners. It provides merely that:

> None of the sections enumerated in this subdivision (k) [including Section 48] * * * shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate. * * *

This subdivision, as pointed out by the court below, refers only to proceedings instituted under Section 77B and does not render Section 48 inapplicable to *prior* proceedings which are instituted and conducted under the bankruptcy sections.

This Court has recently had occasion to stress the independence from one another of bankruptcy proceedings and those under the recently enacted provisions for the relief of debtors. *Realty Corp.* v. *O'Connor,* 295 U. S. 295, 301.

2. It is universally recognized, and petitioners admit, that excessive fees to those entrusted with

the administration of insolvents' estates was one of the evils that Congress sought to eliminate by the enactment of Section 77B. See Senate Report No. 482, 73d Cong., 2d Sess., pp. 3, 4, 7, 9; c. 424, Sec. 3, 48 Stat. 923 (the Act which contains Section 77B); Sec. 72 of the Bankruptcy Act, 11 U. S. C. (1934 ed.), sec. 112; *Realty Corp.* v. *O'Connor*, 295 U. S. 295, 299. This Court, in *Realty Corp.* v. *O'Connor, supra,* has declared (pp. 299–300) that "a court will not forget that Congress meant to hit the evil of extravagance, and that the meaning of its words, if doubtful, must be adapted to its aim." Congress, concerned with excessive and exorbitant fees, cannot have intended by mere inference to disturb existing restrictions upon allowances.

Petitioners contend that the decision below will be an incentive to trustees to liquidate in order to procure maximum fees, rather than to look toward the reorganization of insolvents' estates. It would seem rather, if trustees may be considered to be so motivated, that this decision should tend to hasten transfers to proceedings under Section 77B, and thus to give effect to the purpose of Congress to have economical and speedy reorganization of insolvents' estates. Cf. *Realty Corp.* v. *O'Connor, supra,* p. 299; *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 685.

3. The same conclusion has been reached by a District Court. *In re Paramount Publix Corp.* (S. D. N. Y., December 10, 1934, unreported, cited in the opinion below).

Petitioners do not contend that there is a conflict of decisions, but imply that the decision below is inconsistent with a decision of the same court rendered in *In re New York Investors, Inc.*, 79 F. (2d) 182. The *Investors* case involved the applicability of Section 77B to allowances fixed by the equity receivership court that preceded the reorganization court. The court there referred to the fixing of "reasonable" fees by the equity court but only because the equity court was subject to no statutory restrictions, and not because Section 77B provided the equity court with independent power to fix the allowances.

In *In re 211 E. Delaware Building Corp., Inc.*, 7 F. Supp. 892 (E. D. Ill.), the court, in dealing with allowances made in a prior equity receivership, had adopted substantially the same line of reasoning as that in the *New York Investors* case.

4. None of the issues here presented will arise unless Section 77B reorganization proceedings are preceded by other Federal or State insolvency proceedings. When the present transitional period is passed, it is believed that only isolated reorganization proceedings will be preceded by other insolvency proceedings.

CONCLUSION

The decision of the court below is correct and is in accord with the principles announced by this Court in *Realty Corp.* v. *O'Connor, supra.* There is no conflict of decisions. The question presented

is not one of general or continuing importance. It is therefore respectfully submitted that the petition should be denied.

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ELI WHITNEY DEBEVOISE.

NOVEMBER 1935.

APPENDIX

NATIONAL BANKRUPTCY ACT AS AMENDED

SEC. 48. (a) [11 U. S. C. (1934 ed.), Sec. 76.] Trustees shall receive for their services, payable after they are rendered, * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed 6 per centum on the first $500 or less, 4 per centum on moneys in excess of $500 and less than $1,500, 2 per centum on moneys in excess of $1,500 and less than $10,000, and 1 per centum on moneys in excess of $10,000. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of 1 per centum of the amount to be paid the creditors on such composition.

(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

* * * * *

(e) Where the business is conducted by trustees, * * * as provided in clause 5 of section 11, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person,

including lienholders, by them, * * *; such commissions not to exceed 6 per centum on the first $500 or less, 4 per centum on moneys in excess of $500 and less than $1,500, 2 per centum on moneys in excess of $1,500 and less than $10,000, and 1 per centum on moneys in excess of $10,000. In case of the confirmation of a composition such commissions shall not exceed one-half of 1 per centum of the amount to be paid creditors on such composition. Before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section 94.

SEC. 72. [11 U. S. C. (1934 ed.), Sec. 112.] Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this title.

SECTION 77B.—

(i) [11 U. S. C. (1934 ed.), Sec. 207 (i).] If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after June 7, 1934, at 12 o'clock noon, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the pro-

tection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. If a receiver or trustee has been appointed by a Federal or State or Territorial court prior to the institution of a proceeding under this section, and such proceeding shall be dismissed under subdivision (c), clause (8), of this section, the judge may include in the order of dismissal appropriate orders directing the trustee or trustees, or the debtor if no trustee is appointed, to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver or prior trustee so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by any trustee or trustees appointed under this section, and for the payment of administrative expenses and allowances in the proceeding hereunder. For the purposes of this section the words "Federal court" shall include the district courts of the United States and of the Territories and possessions to which this section and section 206 of this title are or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska, and the District Court of the United States for the Territory of Hawaii.

(k) [11 U. S. C. (1934 ed.), Sec. 207 (k).] If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section 45 of this title, who shall be compensated

as provided in section 68 of this title; (2) the first meeting of creditors shall be held as provided in section 91 of this title, upon notice as provided in section 94 of this title; (3) a trustee or trustees shall be appointed as provided in section 72 of this title, and be compensated as provided in section 76 of this title; (4) claims which are provable under section 103 of this title may be proved as provided in section 93 of this title, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 104 of this title; (6) sales shall be made as provided in subdivision (b) of section 110 of this title; (7) dividends may be declared and paid as provided in section 105 of this title. None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 93 of this title, and subdivisions (a) and (e) of section 110 of this title, shall apply to proceedings instituted under this section unless and until an order has been entered directing the trustee or trustees to liquidate the estate. All other provisions of this title, except such as are inconsistent with the provisions of this section, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors"; "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the

same consequences and effect as an order of adjudication.

SEC. 3 OF THE ACT OF CONGRESS OF JUNE 7, 1934, C. 424, 48 STAT. 923 (11 U. S. C. (1934 ED.), SEC. 76A)—

> * * * The compensation allowed a receiver or trustee or an attorney for a receiver or trustee shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate of the bankrupt and the interests of the creditors therein.

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